

Decision 03-06-075

June 19, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Establish Policies and Cost Recovery
Mechanisms for Generation
Procurement and Renewable Resource
Development.

Rulemaking 01-10-024
(Filed October 25, 2001)

ORDER MODIFYING DECISION (D.) 02-12-069
AND DENYING REHEARING

I. SUMMARY

This decision denies the rehearing applications of Pacific Gas & Electric Co. (PG&E) and San Diego Gas & Electric Co. (SDG&E) of D.02-12-069, which adopts the Operating Order under which the major investor-owned electric utilities were required to perform contract administrative services on behalf of the Department of Water Resources (DWR) as of January 1, 2003, pursuant to Assembly Bill (AB) X1-1. On December 30, 2002, PG&E timely filed an application for rehearing. SDG&E timely filed its rehearing application on January 21, 2003. Prior to this Decision, PG&E, SDG&E, Southern California Edison Company (SCE), and Sempra Energy Resources (Sempra) also filed rehearing applications of another related decision, D.02-09-053 (Contract Allocation Decision). In D.02-09-053, the Commission allocated DWR power contracts for operating purposes to the utilities. D.02-09-053 also directed the electric utilities to file proposed joint Operating Agreements with DWR. Those applications are the subject of a separate order.

On December 20, 2002, after repeated unsuccessful attempts, PG&E and DWR, and SDG&E and DWR executed Operating Agreements, which were subsequently

approved by the Commission, with modifications, in D.03-04-029 (Decision on Motions to Approve Operating Agreements). SDG&E and PG&E submitted advice letters, attaching the modified Operating Agreements, as ordered by D.03-04-029. PG&E accepted the Commission's modifications in its advice letter filing. SDG&E did not fully accept the modifications in its initial advice letter filing, but subsequently accepted the modifications and is therefore no longer subject to the Operating Order. We affirm the Commission's legal authority to issue the Decision and Operating Order since it still applies to SCE, which did not file a jointly proposed Operating Agreement with DWR.

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

In Decision (D.) 09-02-053, the Commission ordered PG&E, SDG&E and SCE to assume the operational, dispatch, and administrative functions for the DWR contracts.¹ The DWR contracts were to be allocated to the resource portfolios of the three utilities to be scheduled and dispatched in a least-cost manner. The utilities were also ordered to jointly file proposed Operating Agreements with DWR and proposed Standards for Reasonableness Review by October 1, 2002.

The utilities and DWR were unsuccessful, after repeated attempts, to reach a consensus on an Operating Agreement. Therefore, on December 19, 2002, the Commission adopted D.02-12-069, ordering the utilities to enter into and comply with the Operating Order attached therein. On December 20, 2002, DWR executed an Operating Agreement with PG&E, and another with SDG&E and filed them with the Commission.

On December 30, 2002, PG&E filed an application for rehearing of the Operating Order Decision. SDG&E filed on January 21, 2003. PG&E and SDG&E made numerous allegations, many of which are a repeat of their rehearing applications of D.02-09-053. They both claim that the decision violates the prohibition against hindsight reasonableness reviews, as specified in Water Code §80110. They further contend that the Commission has exceeded its authority in ordering the utilities to comply with the

¹ D.02-09-053 was adopted on September 19, 2002, and mailed on September 23, 2002.

Operating Order. PG&E also asserts that the Commission does not have the jurisdiction to require DWR to comply with the Decision and Operating Order. Other arguments made by PG&E are that the decision: is an unlawful attempt to impose contractual obligations on it without its consent; is not supported by substantial evidence; constitutes an unlawful tax on PG&E; and violates the Due Process and Taking Clauses of the U.S. and California Constitutions.

SDG&E asserts that the Decision's process would violate AB 57 §1(c), codified as PU Code §454.5 (c), in failing to investigate or make findings that the utilities' creditworthiness would not be adversely affected by the reasonableness standard it proposed in D.02-12-069. This is essentially the same argument SDG&E made in its rehearing application of D.02-09-053 with respect to the gas tolling requirements.

On March 7, 2003, SCE filed a Petition to Modify Decision 02-12-069.² On April 3, 2003, in D.03-04-029, the Commission approved, with modifications, the Operating Agreements that DWR executed with PG&E and SDG&E. SDG&E and PG&E submitted advice letters, attaching the modified Operating Agreements, as ordered by D.03-04-029. PG&E accepted the Commission's modifications in its advice letter, and will no longer be subject to the Operating Order. SDG&E did not fully accept the modifications in its initial advice letter filing; however, it subsequently accepted the modifications and is now no longer subject to the Operating Order. SCE did not file a jointly proposed Operating Agreement with DWR, and therefore remains subject to the Operating Order.

III. DISCUSSION

A. The Commission Has Broad Authority to Issue the Decision and Operating Order.

We affirm our authority to issue the Decision and Operating Order on December 19, 2002, which applies to SCE. We address the claim that the Decision and Operating Order exceed the Commission's authority under PU Code §701 and the Water

² That petition is not within the scope of this rehearing.

Code. In D.02-12-069, we stated that our legal authority derives from the explicit statutory authority provided in Water Code Section §80016 and §80106(b) and from the Commission's general statutory authority under §701.³ The Decision does not include an exhaustive analysis of the Commission's broad authority to issue the Decision and Operating Order. Its focus was on the explicit statutory authority particularly relevant to these circumstances. It should be clearly understood that the Commission retains its fundamental authority to regulate public utilities in the public interest. The Commission derives its authority from Article XII of the California Constitution, which establishes the Commission and gives it broad regulatory power over public utilities.

The Commission is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers. (*Wise v. PG&E* (1999) 77 Cal.App.4th 287.) In line with this broad authority, the Legislature enacted §701, which grants the Commission authority to "do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient" in the supervision and regulation of California public utilities.⁴ The Court has ruled that the Commission's power pursuant to §701 should be liberally construed. (*SDG&E v. Sup. Ct.* (1996) 13 Cal.4th 893, 915.) The Commission is not restricted to matters expressly specified, but may exercise jurisdiction in matters incident to its express authority. The matters must be "cognate and germane" to the regulation of public utilities and not in conflict with another statutory directive. (*Consumers' Lobby Against Monopolies v. Pub. Util. Com.* (1979) 25 Cal.3d 891, pp. 905-506.) See also *Greyhound Lines v. Pub. Util. Com.* (1968) 68 Cal.2d 406, upholding the Commission's §701 authority to require additional bus route.) The Commission's jurisdiction over the energy utilities' procurement obligations

³ See D.02-12-069, *mimeo*, pp. 9-10. Water Code 80106(b) states, in pertinent part, "at the request of the Department, the Commission shall order the related electrical service corporation...to provide billing collection and other related services, as agent of the Department." Water Code §80016 provides that "all state agencies...are hereby authorized to, at the request of the Department, give the Department reasonable assistance or other cooperation in carrying out the purposes of this division [Division 27 of the Water Code]." Section 701 grants the Commission broad authority to do all things necessary and convenient in regulating public utilities.

⁴ Stats. 1951, Ch. 764.

is cognate and germane to public utility regulation, and is essential to ensuring that the utilities fulfill their obligation to serve their customers.

B. PG&E's and SDG&E's Remaining Arguments Have Been Disposed of in D.03-06-074.

PG&E and SDG&E repeated many of the same arguments they made in their rehearing applications of D.02-09-053 (Contract Allocation Decision). An argument that cuts across the board is their contention that the Decision violates the prohibition against hindsight reasonableness reviews, and thereby violates Water Code §80110. This claim was fully analyzed in D.03-06-074. We therefore incorporate by reference our analysis of this issue. SDG&E also opposed the reasonableness standard as being unlawfully vague in that the utility will have little “upfront” guidance as to how its administration of DWR contracts will be assessed. The Commission has set forth the upfront standards for utility administration of DWR contracts in D.02-10-062. Any complaints of upfront standards are more properly directed to that decision. We note that SDG&E has filed an application for rehearing of that decision.

Other allegations made by PG&E that repeat arguments found in its rehearing application of D.02-09-053 are that the decision: 1) is an unlawful attempt to impose contractual obligations on it without its consent; 2) lacks substantial evidence; 3) constitutes an unlawful tax on PG&E; and 4) violates the Due Process and Taking Clause of the U.S. and California Constitutions. We responded to these arguments in the decision disposing of the rehearing applications of D.02-09-053, and we incorporate by reference our analysis.

SDG&E asserts that the Decision's process would violate PU Code §454.4 (c) in failing to make findings that the utilities creditworthiness would not be adversely affected by the reasonableness standard proposed in D.02-12-069. Again, this argument repeats the claim SDG&E made in its rehearing application of D.02-09-053 with respect to the gas tolling requirements. Since the reasonableness standard in D.02-12-069 is the same as that proposed in D.02-09-053, we incorporate by reference our previous response.

In sum, the remaining challenges to the Operating Order are repetitions or variations of arguments made in opposition to D.02-09-053. Those arguments were disposed of in D.03-06-074. We incorporate by reference our analysis of these arguments.

C. PG&E and SDG&E Are No Longer Subject to the Operating Order.

In D.03-04-029, PG&E and SDG&E were directed to file, by means of the advice letter process, revised Operating Agreements with DWR accepting the modifications set forth in that decision.⁵ In addition, the utilities (including SCE) were ordered to file initial Utility Gas Supply Plans by April 17, 2003. They were also directed to file subsequent gas supply plans every six months thereafter for the term of the Operating Agreements/Order.

On April 17, 2003, PG&E filed Advice Letter 2359-E, accepting the modifications set forth in D.03-04-029, and is no longer subject to the Operating Order. SDG&E filed Advice Letter 1489-E on the same date, but did not fully accept the Commission's modifications. SDG&E has since accepted the Commission's modifications. Therefore, PG&E and SDG&E are no longer subject to the Operating Order. SCE, having been granted an extension, filed Advice Letter 1701-E on April 18, 2003. SCE remains subject to the Operating Order because it did not file a jointly proposed Operating Agreement with DWR.⁶

IV. CONCLUSION

We affirm that the Commission's broad authority over public utilities in the state, in conjunction with the explicit statutory authority set forth in Water Code §80016, §80106, and PU Code §701, provides the Commission with ample authority to promulgate the Decision and the Operating Order contained therein. It should be

⁵ In D.03-04-029, the Commission approved the Operating Agreements, with modifications, on a prospective basis.

⁶ The Commission declined to require SCE to enter into an Operating Agreement with DWR, although it was receptive to reviewing a mutually agreeable Operating Agreement between SCE and DWR so long as the terms did not substantially deviate from the terms in D.02-12-069, or D.03-04-029. (D.03-04-029, mimeo, p. 35.)

understood that the Commission's authority is not limited to the aforementioned statutes. Rather, it implicitly includes the broad authority the Commission derives from the California Constitution and throughout the Public Utilities Code, which authority the Commission retains at all times. We therefore clarify the Decision accordingly.

Pursuant to PG&E's acceptance of the Commission's modifications of its joint Operating Agreement with DWR, as evidenced by its advice letter filing, it is no longer subject to the Operating Order. SDG&E did not fully accept the modifications in its initial advice letter filing, but subsequently accepted them, and therefore is no longer subject to the Operating Order. We affirm the Commission's legal authority to issue the Decision and Operating Order, which still applies to SCE.

Therefore, **IT IS ORDERED** that:

1. Decision 02-12-069 is modified as follows:

- (a) On page 10, preceding the first full paragraph, insert this paragraph:

In addition to the explicit authority cited, the Commission implicitly has general powers bestowed upon it by the California Constitution, Art XII, and throughout the Public Utilities Code. These authorities bestow broad and fundamental powers on the Commission to regulate public utilities in the public interest. The Commission may issue orders pursuant to that authority. It should be therefore understood that the Commission has these powers at its disposal at all times, and may properly bring them to bear in issuing the Decision and Operating Order contained therein.

- (b) Conclusion of Law No. 1 shall be modified to read as follows:

The Commission's action ordering the utilities to comply with the Operating Order is consistent with its constitutional authority in the California Constitution, Art. XII, to regulate public utilities in the public interest, its general authority under §701 to do all things necessary and convenient in the supervision and regulation thereof, and the statutory authority provided in Water Code §80016 and §80106.

2. The applications of PG&E and SDG&E for the rehearing of D.02-12-069, as modified, are hereby denied.

This order is effective today.

Dated June 19, 2003 at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners